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IN THE

Supreme Court of the United States

TECK COMINCO METALS, LTD.,

Petitioner,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL, AND STATE OF WASHINGTON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE NATIONAL MINING ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

Of Counsel:

HAROLD P. QUINN, JR.
TAWNY A. BRIDGEFORD
NATIONAL MINING ASSOCIATION
101 Constitution Avenue, N.W.
Suite 500 East
Washington, D.C. 20001
(202) 463-2600

CATHERINE E. STETSON
Counsel of Record
JESSICA L. ELLSWORTH
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

JAN S. AMUNDSON
QUENTIN RIEGEL
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 637-3000

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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CASES:

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American Banana Co. v. *United Fruit Co.*, 213 U.S. 347 (1909) 6

American Cyanamid Co. v. *Capuano*, 381 F.3d 6 (1st Cir. 2004) 18

Benz v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957) 7

Bowen v. *Massachusetts*, 487 U.S. 879 (1988) 9

Deaton v. *United States*, 541 U.S. 972 (2004) 2

E.E.O.C. v. *Arabian American Oil Co.*, 499 U.S. 244 (1991) 4, 6, 7

Engine Mfrs. Ass'n v. *South Coast Air Quality Mgmt. Dist.*, 539 U.S. 914 (2003) 2

F. Hoffman-La Roche Ltd. v. *Empagran S.A.*, 542 U.S. 155 (2004) 7

Hartford Fire Ins. Co. v. *California*, 509 U.S. 764 (1993) 7

Iselin v. *United States*, 270 U.S. 245 (1926) 19

Lamie v. *United States Tr.*, 540 U.S. 526 (2004) 19, 20

Mobil Oil Corp. v. *Higginbotham*, 436 U.S. 618 (1978) 20

Murray v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) 6-7

Robinson v. *Shell Oil Co.*, 519 U.S. 337 (1997) 19

Small v. *United States*, 544 U.S. 385 (2005) 7

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United States v. *150 Acres of Land*, 204 F.3d 698 (6th Cir. 2000) 8

United States v. *CDMG Realty Co.*, 96 F.3d 706 (3d Cir. 1996) 8

United States v. *Township of Brighton*, 153 F.3d 307 (6th Cir. 1998) 8

Washington State Dep't of Social & Health Servs. v. *Guardianship Estate of Keffeler*, 537 U.S. 371 (2003) 19

STATUTES:

33 U.S.C. § 1342(k) 16

42 U.S.C. § 7661c(f) 16

42 U.S.C. § 9607(a) 8

42 U.S.C. § 9607(a)(3) 8, 18

42 U.S.C. § 9607(a)(4) 8, 18

Colo. Rev. St. §§ 13-1.5-101 *et seq.* 11

Mich. Laws Ann. §§ 324.1801 *et seq.* 11

Or. Rev. Stat. §§ 468.078 *et seq.* 11

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30 C.F.R. § 780.18 16

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***RULES*:**

S. Ct. Rule 10(a) 17

S. Ct. Rule 37.6 1

***LEGISLATIVE MATERIALS*:**

S. Rep. No. 93-906 (1974) 10

Sen. Bill No. 906 (110th Cong.) (introduced Mar. 15, 2007) 15

***TREATIES*:**

Agreement Concerning the Transboundary Movement of Hazardous Waste, Oct. 28, 1986, TIAS No. 11099, Art. 7 10

***OTHER AUTHORITIES*:**

John W. Boscariol, *An Anatomy of A Cuban Pyjama Crisis: Reconsidering Blocking Legislation in Response to Extraterritorial Trade Measures of the United States*, 30 Law & Pol'l Int'l Bus. 439 (1999) 14

Letter from Paul Cellucci, Ambassador of the United States of America to Canada to Michael O. Leavitt, Administrator, U.S. Environmental Protection Agency (June 15, 2004) 13

Clean Air Report, *Industry Calls for Relaxed Haze Rule Following New Emissions Study* (Mar. 9, 2006), *available at* 2006 WLNR 3888059 16

Decl. of the United Nations Conf. on the Human Env't, Principle 22 (June 16, 1972) 10

TABLE OF AUTHORITIES—Continued

Page

ECC, "The Role of ECC," *available at* http://www.env.gov.bc.ca/spd/ecc/role. html 11

EPA Press Release, "Canada and U.S. Move Forward to Reduce Air Pollutants" (Apr. 13, 2007), *available at* http://www.epa.gov/airmarkets/progsregs/usca/pressrelease.html 10

Leta Hong Fincher, Voice of America News: Worldwatch Institute—16 of the World's Most-Polluted Cities in China (June 28, 2006)..... 15-16

Foreign Extraterritorial Measures Act, R.S.C., ch. F-29 (1985) (Can.)..... 14

Gut Dam Arbitration/Settlement (U.S. v. Can.), *reprinted in* 8 I.L.M. 118 (1969)..... 10

Shi-Ling Hsu & Austen L. Parrish, "Litigating Canada–U.S. Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity," 48 Va. J. of Int'l L. 1 (publication forthcoming Oct. 2007), *available at* http://ssrn.com/abstract=967519 13-14

IJC, "Transboundary Air Pollution, Detroit and St. Clair River Areas" (1972), *available at* http://www.ijc.org/php/publications/pdf/ID380.pdf 9

IJC, "Transboundary Impacts of the Missisquoi Bay Causeway and the Missisquoi Bay Bridge Project" (2005), *available at* http://www.ijc.org/php/publications/pdf/ID1570.pdf..... 9

Michael Ilg, *Environmental Harm and Dilemmas of Self-Interest: Does International Law Exhibit Collective Learning?*, 18 Tul. Envtl. L.J. 59 (2004) 15

TABLE OF AUTHORITIES—Continued

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Christopher L. Ingrim, *Choice-of-Law Clauses: Their Effect on Extraterritorial Analysis—A Scholar's Dream, A Practitioner's Nightmare*, 28 Creighton L. Rev. 663 (1995) 17

Nancy Kubasek & Jay Threet, *Cooper Industries, Inc.* v. *Aviall Services, Inc.: Time for a Legislative Response to Restore Voluntary Remediation*, 51 St. Louis U. L.J. 165 (2006) 15

Manitoba, Transboundary Pollution Reciprocal Access Act, C.C.S.M., 1985, c. T145 11

NMA, The Economic Contributions of the Mining Industry in 2005 (2007) 2

Prince Edward Island, Transboundary Pollution (Reciprocal Access) Act, R.S.P.E.I., 1988, c. T-5 11

Province of Ontario Amicus Br., *United States* v. *Cinergy Corp.*, Case No. 06-1224 (7th Cir.) (filed May 9, 2006) 14

Rokjin J. Park, *et al.*, "Natural and Transboundary Pollution Influences on Sulfate-Nitrate-Ammonium Aerosols in the United States," 109 J. of Geophysical Research D15204 (2004) 15

Austen L. Parrish, *Trail Smelter Deja Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. Rev. 363 (2005) 13

Rio Decl. on Env't and Dev., Principle 13 (June 14, 1992) 10

Trail Smelter Arbitral Tribunal (U.S. v. Can.) (Mar. 11, 1941), 35 Am. J. Int'l L. 684 (1941) 10

TABLE OF AUTHORITIES—Continued

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Trail Smelter Arbitral Tribunal (U.S. v. Can.) (Apr. 16, 1938), 33 Am. J. Int'l L. 182 (1939)..... 10

Uniform Transboundary Pollution Reciprocal Access Act (Uniform Act), 9C U.L.A. 387 (2001)... 11

United Nations, Int'l Law Comm'n, Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, 56th Session, Principles 4, 6 (A/CN.4/L.662) (July 2004)..... 11

United States Department of State, Background Note: Canada (Mar. 2007), *available at* http://www.state.gov/r/pa/ei/bgn/2089.htm..... 9

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BRIEF FOR AMICI CURIAE NATIONAL MINING ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National Mining Association ("NMA") is a national trade association that represents all aspects of the mining industry, including producers of most of America's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral processing machinery and supplies; bulk transporters; mineral processors; financial and engineering

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6. Consent letters from all parties have been filed with the Clerk.

firms; and other businesses related to mining. The mining industry produces vital resources needed to fuel our economy and manufacture virtually all commodities sold in domestic and foreign markets. In 2005, the U.S. mining industry produced $78.4 billion of finished mineral, metal and fuel products; these products were in turn used to create an additional $2 trillion worth of consumer and industrial goods. *See* The Economic Contributions of the Mining Industry in 2005 at 3, prepared for National Mining Association (2007).

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Its mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

Amici regularly represent their members' interests before Congress, state legislatures, and federal and state courts and have participated as *amici* in numerous cases pending before this Court, including cases involving application of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and other environmental laws. *See, e.g.*, *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, No. 02-1343, 539 U.S. 914 (2003) (NAM); *Deaton* v. *United States*, No. 03-701, 541 U.S. 972 (2004) (NMA).

Amici have a substantial interest in this case. Their members own or operate facilities located near the U.S. borders with Canada and Mexico and adjacent to cross-boundary bodies of water. The Ninth Circuit concluded that applying CERCLA to petitioner Teck Cominco Metals, Ltd. ("Teck"), a Canadian corporation, for conduct occurring solely in Canada was not an extraterritorial application of

CERCLA. The Ninth Circuit's unprecedented application of CERCLA liability—and its contorted interpretation of the presumption against extraterritorial application of U.S. laws—threatens to disrupt the cooperative diplomatic approach traditionally, and successfully, employed to address transboundary environmental issues.

Of crucial importance to *amici*, the Ninth Circuit's decision also may trigger reciprocal actions by foreign nations and their citizens against United States companies—including *amici*'s members—for conduct within the United States alleged to harm foreign natural resources. Such actions could adversely impact *amici*'s members and other United States companies and generate conflict and confusion over which laws govern their activities within the United States. *Amici*'s members favor an interpretation of CERCLA that establishes a clear and predictable scope for liability under the statute—and avoids the business uncertainty that would result if conduct in the United States in full compliance with federal and state environmental laws could nonetheless lead to liability imposed in foreign courts based on foreign laws.

SUMMARY OF ARGUMENT

This CERCLA case arises because of activities allegedly undertaken by Teck, a Canadian corporation, at a smelter located in Canada. Respondents allege that hazardous substances from that smelter have migrated along the Columbia River from Canada into the State of Washington. The District Court acknowledged that imposing liability on Teck "involves an extraterritorial application of CERCLA to conduct occurring outside U.S. borders," because the alleged contamination "in the United States would not exist without the activity at the smelter located in British Columbia." Pet. App. 37a, 38a. But it nonetheless held that applying CERCLA to Teck was appropriate. The Ninth Circuit affirmed on the wholly different ground that imposing liability on Teck was merely a "domestic" application of

CERCLA—even though Teck is indisputably a foreign corporation and is not alleged to have engaged in any conduct inside the United States. Pet. App. 14a.

The Ninth Circuit's decision extends "domestic" applications of CERCLA liability to cover any actions by any entity around the globe that allegedly result in hazardous substances reaching U.S. shores. Such a reading of the presumption against extraterritoriality seriously undermines, to the point of gutting, the "long-standing principle of American law 'that legislation of Congress, unless a contrary intention appears, is meant to apply only within the territorial jurisdiction of the United States.' " *E.E.O.C.* v. *Arabian American Oil Co.* ("*Aramco*") 499 U.S. 244, 248 (1991) (citation omitted). This principle protects "against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* And adhering to the presumption against extraterritoriality is particularly appropriate in this context, because transboundary pollution is a matter of quintessential international concern—and has consistently been recognized as such.

Transboundary pollution issues have traditionally been addressed through diplomatic discourse and bilateral agreements. The Ninth Circuit's holding sets two countries—and businesses on both sides of the U.S.-Canada border—on a path away from cooperative diplomacy in the resolution of cross-border environmental issues and toward piecemeal litigation by private parties under CERCLA that will (indeed, already has) upset diplomatic relations between the United States and Canada. And the import of the Ninth Circuit's decision is by no means limited to foreign conduct in Canada. The court's rationale applies to conduct occurring across the border with Mexico, or for that matter in any foreign country, that allegedly causes adverse effects in the United States. Air and water migrate without regard to international boundaries, and science is increasingly capable of tracking the flow of environmental contaminants. The

Ninth Circuit's decision effectively opens United States courts to claims under CERCLA with respect to conduct the world over, potentially inviting unintended clashes with the interests of numerous sovereigns and the businesses operating within their boundaries.

American businesses will suffer the consequences of the international discord generated by the decision below. Applying CERCLA to foreign companies operating on foreign soil will inevitably encourage retaliatory actions by foreign countries and foreign citizens against U.S. businesses. And the prospect that the environmental laws of foreign countries may govern the activities of a company's domestic operations will add to the complex regulatory requirements that U.S. businesses already must navigate under United States law. American businesses should not be subjected to those added burdens unless they are expressly contemplated by Congress—and CERCLA evidences no such express directive. This Court should grant the petition for a writ of certiorari to examine—and reverse—the Ninth Circuit's unprecedented and far-reaching ruling.

There is an additional reason to grant certiorari. The Ninth Circuit split with the First Circuit over the contours of the "arranger" liability provision of CERCLA. This split means that the category of parties potentially subject to arranger liability is now defined differently—even for the same company—depending where in the country a company is operating. Given the stringent liability standard codified in CERCLA, it is particularly important that the requirements for arranger liability be clear, predictable, and consistent across the Nation.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION INVITES RETALIATION AGAINST AMERICAN BUSINESSES AND FOSTERS UNCERTAINTY AND DISCORD FOR NUMEROUS AMERICAN INDUSTRIES.

A. The Ninth Circuit's Decision Distorts The Meaning Of The Presumption Against Extraterritorial Application Of U.S. Law.

There is a strict presumption against extraterritorial application of U.S. law. It can only be overcome by a "clear statement" of Congressional intent to do so. *Aramco*, 499 U.S. at 259. The Ninth Circuit circumvented that strict presumption by finding that application of CERCLA liability to Teck—a Canadian company whose conduct occurred solely in Canadian territory—was a domestic application of U.S. law. This holding departs wildly from this Court's precedents. It also undercuts the fundamental principles on which those precedents are based, and it denigrates the bilateralism that has traditionally characterized the U.S.-Canadian approach to resolving transboundary pollution issues. A grant of certiorari is warranted.

The presumption that a domestic statute applies only domestically protects against "international discord" by preventing clashes of United States and foreign law. *Aramco*, 499 U.S. at 248. As Justice Holmes explained, an act's lawfulness "must be determined wholly by the law of the country where the act is done." *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356 (1909). Anything else is "unjust" and "an interference with the authority of another sovereign." *Id.* [2]

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[2] A related canon of construction is also relevant here. "[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v.

A party arguing in favor of the extraterritorial application of a law has the burden to show that Congress intended that expansive reach. *Aramco*, 499 U.S. at 250. This is a significant burden indeed; for there must be "affirmative evidence" that Congress "clearly expressed" its intent that the statute at issue apply abroad. *Id.* at 258; *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957). It is well-established that "Congress ordinarily intends its statutes to have domestic, not extraterritorial, application." *Small* v. *United States*, 544 U.S. 385, 388 (2005); *see also id.* at 400 (Thomas, J., dissenting) ("extraterritoriality canon" restricts "federal statutes from reaching conduct *beyond U.S. borders*") (emphasis in original). When Congress intends to depart from ordinary domestic application, it has explicitly done so. *Aramco*, 499 U.S. at 258 (citing examples).

The District Court concluded that there was "no direct evidence that Congress intended extraterritorial application of CERCLA to conduct occurring outside the United States." Pet. App. 57a. That is, of course, correct; and no court has concluded otherwise. But undeterred by this clear lack of affirmative Congressional intent to impose CERCLA liability for conduct occurring abroad, the Ninth Circuit found another way around the presumption. It concluded that the presumption did not come into play because CERCLA was actually being applied "domestic[ally]" to Teck—a Canadian company operating in Canada. Pet. App. 14a.

In reaching this curious conclusion, the Ninth Circuit focused exclusively on whether a "release" occurred in the

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Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). Under this canon of "prescriptive comity," *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 165 (2004), "statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 815 (1993). It is an established principle of international law that nations not intrude on each other's sovereign interests.

United States. *Id.* at 19a, 20a. It neglected the other text in CERCLA's liability provision. CERCLA liability is premised on finding that a person within one of four delineated categories of liable parties had the required nexus to a vessel or facility from which there is a release. For the third category of liable parties—"arrangers"—liability is imposed where: (1) the person arranged (by contract, agreement, or otherwise) for disposal or treatment at a facility; *and* (2) there was a release or threatened release of a hazardous substance from that facility. 42 U.S.C. § 9607(a).[3]

Thus, a "domestic" application of arranger liability requires both that there be a release from a domestic facility—which the Ninth Circuit found had occurred—*and* that the party by contract, agreement, or otherwise arranged for disposal *at that domestic facility*.[4] The Ninth Circuit never addressed this point, even though no one—not the EPA, the District Court, or the Ninth Circuit—has ever disputed that whatever "arranging" is allegedly attributable to Teck did not occur in the United States. Holding Teck liable under U.S. law for conduct it performed solely within

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[3] The arranger-liability provision states in relevant part: "*any person who by contract, agreement, or otherwise arranged for disposal or treatment* * * * of hazardous substances * * * *at any facility* * * * *from which there is a release* * * * of a hazardous substance, shall be liable" for certain costs. *Id.* § 9607(a)(3), (4) (emphases added). The phrase beginning "from which there is a release" modifies subparagraphs 1-4, even though it follows subparagraph 4. *See, e.g., United States* v. *Township of Brighton*, 153 F.3d 307, 328 n.8 (6th Cir. 1998).

[4] Courts have repeatedly held that the term "disposal" does not include the passive migration of materials; it requires "active human conduct." *United States* v. *150 Acres of Land*, 204 F.3d 698, 705-706 (6th Cir. 2000) (noting CERCLA's distinction between the definitions of "disposal" and "release"); *accord ABB Indus. Sys., Inc.* v. *Prime Tech., Inc.*, 120 F.3d 351, 358 (2d Cir. 1997); *United States* v. *CDMG Realty Co.*, 96 F.3d 706, 714 (3rd Cir. 1996).

Canada—and that was authorized by Canadian law—plainly implicates the presumption against extraterritoriality.

B. The Ninth Circuit's Decision Flouts The International Mechanisms Long Deemed Appropriate For Resolving Transboundary Pollution Issues.

The Ninth Circuit decision does a grave disservice to the United States' history of addressing transboundary pollution through diplomatic channels and international agreements. Congress enacted CERCLA in 1980 against the backdrop of a settled international framework for addressing transboundary pollution issues—including issues relating to the very smelter at issue in this case. There is no indication whatsoever that Congress sought to meddle with that established framework when it enacted CERCLA.[5]

For nearly a century, the United States and Canada have looked to bilateral, diplomatic resolutions of transboundary pollution issues. *See generally* United States Department of State, Background Note: Canada (Mar. 2007) ("The U.S. and Canada also work closely to resolve transboundary environmental issues, an area of increasing importance in the bilateral relationship."). In the Boundary Waters Treaty of 1909, the two nations created the International Joint Commission ("IJC") to resolve disputes over boundary waters. The IJC has since played a crucial role in resolving transboundary pollution issues. *See, e.g.*, IJC, "Transboundary Impacts of the Missisquoi Bay Causeway and the Missisquoi Bay Bridge Project" (2005); IJC, "Transboundary Air Pollution, Detroit and St. Clair River Areas" (1972).

In 1939, when emissions from the Canadian smelter involved in this case were alleged to be damaging property in the United States, the two nations agreed to an arbitration

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[5] Congress is presumed to know the state of existing law when it legislates. *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988).

procedure that gave rise to one of the seminal decisions on international pollution—the "Trail Smelter Arbitration." Trail Smelter Arbitral Tribunal (U.S. v. Can.) (Apr. 16, 1938), 33 Am. J. Int'l L. 182 (1939); Trail Smelter Arbitral Tribunal (U.S. v. Can.) (Mar. 11, 1941), 35 Am. J. Int'l L. 684 (1941). The United States did not unilaterally assess liability for acts within the sovereign nation of Canada. It employed the traditional method of resolving sensitive questions of transboundary environmental harm through international channels, not private litigation.

The list goes on; this Nation's history is replete with other examples of the United States' bilateral approach to transboundary harms. The United States and Canada used international arbitration to resolve harms to U.S. citizens caused by flooding and erosion from a Canadian dam. *See* Gut Dam Arbitration/Settlement (U.S. v. Can.), *reprinted in* 8 I.L.M. 118 (1969). A few years later, the United States and Mexico negotiated resolution of a longstanding controversy over the increased salinity of water reaching Mexico via the Colorado River. *See* S. Rep. No. 93-906 (1974). The United States and Canada signed an agreement twenty years ago to resolve issues of moving hazardous waste across their shared border. Agreement Concerning the Transboundary Movement of Hazardous Waste, Oct. 28, 1986, TIAS No. 11099, Art. 7. And, just last month, the United States and Canada announced they were negotiating an annex to the 1991 U.S.-Canada Air Quality Agreement (Pet. 11) to "reduce[e] the cross-border flow of air pollution and its impact on the health and ecosystems of Canadians and Americans." *See* EPA Press Release, "Canada and U.S. Move Forward to Reduce Air Pollutants" (Apr. 13, 2007).[6]

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[6] Beyond this Nation's own history of bilateralism, international compacts confirm that an active international framework for addressing transboundary pollution exists. *See, e.g.*, Decl. of the United Nations Conf. on the Human Env't, Principle 22 (June 16, 1972); Rio Decl. on Env't and Dev., Principle 13 (June 14, 1992).

Local governments likewise have treated transboundary pollution as an international diplomatic issue. In 1982, for example, the National Conference of Commissioners on Uniform State Laws and the Uniform Law Conference of Canada proposed a Uniform Transboundary Pollution Reciprocal Access Act, 9C U.L.A. 387, 388 (2001). This Act allows a citizen who is injured by pollution emanating from another state to sue in the source state's courts as though he lived in the source state. *Id.* at 394. The plaintiff has the same rights as anyone else in the source jurisdiction. *Id.* at 394-395. The Act has been adopted by several U.S. states and Canadian provinces. *See, e.g.*, Colo. Rev. St. §§ 13-1.5-101 *et seq.*; Mich. Laws Ann. §§ 324.1801 *et seq.*; Or. Rev. Stat. §§ 468.078 *et seq.*; Manitoba Transboundary Pollution Reciprocal Access Act, C.C.S.M., 1985, c. T145; Prince Edward Island Transboundary Pollution (Reciprocal Access) Act, R.S.P.E.I., 1988, c. T-5.[7] And its position—that the source jurisdiction's laws govern—was also adopted by the United Nations. *See* United Nations, Int'l Law Comm'n, Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, 56th Session, Principles 4, 6 (A/CN.4/L.662) (July 2004).[8]

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[7] Although neither the State of Washington nor the Province of British Columbia has adopted the Uniform Act, these two entities created the Environmental Cooperation Council ("ECC") in 1992 to deal with transborder environmental issues. The ECC acts as a "significant catalyst to cooperative environmental management" between British Columbia and Washington, and has a Task Force dedicated to air and water quality issues in the Columbia River Basin. *See* ECC, "The Role of ECC," *available at* http://www.env.gov.bc.ca/spd/ecc/role.html.

[8] In other words, even if this transboundary pollution issue were to be resolved under the domestic law of one of the two sovereigns involved in the dispute, the relevant domestic law that should apply is *Canadian law*—not CERCLA.

This long history reinforces the conclusion that countries can best address and resolve sensitive transboundary pollution problems through diplomatic channels or traditional international law mechanisms, such as arbitration tribunals, that can balance complex diplomatic issues alongside environmental and private interests. Permitting private plaintiffs to bring actions challenging foreign conduct would disrupt the international framework that has long been successfully employed to resolve transboundary environmental disputes.

C. The Ninth Circuit's Decision Will Precipitate Retaliation, Uncertainty, And Discord Throughout American Industries.

Applying CERCLA to foreign companies acting wholly in a foreign country will not only disrupt the settled international framework for resolving transboundary pollution disputes; it also is likely to trigger backlash and retaliation against American companies.

1. Canada reacted to the EPA's Order in this case by pointing to the serious international ramifications of extending CERCLA beyond U.S. borders. The Canadian Government issued a formal Diplomatic Note expressing "concern[]" that the United States would attempt to enforce CERCLA against a Canadian company operating in Canadian territory under Canadian law. 9th Cir. ER 72. The Diplomatic Note emphasized that "issuance of the Unilateral Administrative Order may set an unfortunate precedent, by causing transboundary environmental liability cases to be initiated in both Canada and the United States." *Id.* And it requested that the United States rescind the UAO in favor of "develop[ing] a mutually acceptable and enforceable agreement, in the spirit of the long history of joint Canada-U.S. stewardship of our shared environment." *Id.*

The diplomatic arm of the Executive Branch—in a break from EPA—separately voiced its own concerns over the unilateral extraterritorial enforcement of CERCLA. The

United States Ambassador to Canada asked the EPA to withdraw the UAO. Letter from Paul Cellucci, Ambassador of the United States of America to Canada to Michael O. Leavitt, Administrator, U.S. Environmental Protection Agency (June 15, 2004). His letter explained that "pursuing a clean-up program through legal action under [CERCLA] has the potential, because of its unilateral nature, to cause significant harm to our otherwise productive and cooperative bilateral environmental relationship." *Id.* He echoed the same concern voiced by the Canadian Government: "The Government of Canada could use this precedent to justify its own unilateral decisions regarding U.S. companies whose actions inside the U.S. impact on Canadian watersheds." *Id.*

The EPA eventually responded to the concerns raised by Canada and the Executive Branch and rescinded the UAO. Pet. App. 9a n.10. The rescission of the UAO demonstrates the importance and efficacy of fostering bilateral resolutions of transboundary pollution issues—but it did not resolve this case. For even if EPA rescinds a UAO, it is in no position to extinguish the process to which private parties such as respondents here have access under CERCLA. *See id.*

2. If the Ninth Circuit's decision remains in place, American businesses will face uncertainty and potential retaliation not only from Canada, but from other countries around the globe. "The specter of reciprocity is a very real concern because transboundary pollution flows both ways." Austen L. Parrish, *Trail Smelter Deja Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. Rev. 363, 410-411 (2005). Applying CERCLA to a Canadian company for conduct in Canada invites the government and citizens of Canada to turn the tables and do the same, with United States businesses as the defendants. *See* Shi-Ling Hsu & Austen L. Parrish, "Litigating Canada–U.S. Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial

Reciprocity," 48 Va. J. of Int'l L. 1 (publication forthcoming Oct. 2007), *available at* http://ssrn.com/abstract=967519 (arguing that Canada is likely to turn to extraterritorial application of its environmental statutes to address U.S. pollution causing cross-border harm).

Canada has reacted strongly in the past when it has perceived the United States to be encroaching on its sovereign affairs—and the decision below encourages it to do so again.[9] This concern is not hypothetical. About forty-five percent of rivers on the U.S.-Canadian border, for example, flow from the United States into Canada. Parrish, *supra*, at 410. Industrial emissions from the United States are allegedly causing environmental harm to Canadian Inuit and Arctic wildlife. *Id.* And the Province of Ontario recently argued to the Seventh Circuit that its air quality is compromised by U.S. pollution, pointing out that "[m]ore than 50% of the air pollution in Ontario is generated by U.S. sources." Province of Ontario Amicus Br. 18, *United States* v. *Cinergy Corp.*, Case No. 06-1224 (7th Cir.) (filed May 9, 2006). The Province argued that the "cost of transboundary air pollution in Ontario in human, environmental and economic terms is considerable," including more than $3.7 billion (CDN) in human costs and more than $1 billion in environmental costs. *Id.* at 19.

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[9] In 1985, for example, reacting to the United States' extraterritorial enforcement of its antitrust laws, Canada enacted blocking legislation (titled the Foreign Extraterritorial Measures Act, or FEMA). *See* R.S.C., ch. F-29 (1985) (Can.). FEMA grants Canada's Attorney General broad authority to prevent extraterritorial encroachments on Canadian sovereignty with respect to antitrust proceedings. Throughout the 1990s, the Canadian Attorney General issued orders under FEMA prohibiting Canadian compliance with the United States' extraterritorial efforts to block trade with Cuba. *See* John W. Boscariol, *An Anatomy of A Cuban Pyjama Crisis: Reconsidering Blocking Legislation in Response to Extraterritorial Trade Measures of the United States*, 30 Law & Pol'l Int'l Bus. 439, 452-454 (1999).

Numerous other nations similarly have contended that U.S. industrial practices have caused environmental contamination; indeed, many sources suggest that the United States is the world's largest polluter. *See, e.g.*, Nancy Kubasek & Jay Threet, *Cooper Industries, Inc.* v. *Aviall Services, Inc.: Time for a Legislative Response to Restore Voluntary Remediation*, 51 St. Louis U. L.J. 165, 181 (2006) (stating that the United States Department of Defense "is the world's largest polluter, producing more hazardous waste per year than the five largest United States chemical companies combined"); Michael Ilg, *Environmental Harm and Dilemmas of Self-Interest: Does International Law Exhibit Collective Learning?*, 18 Tul. Envtl. L.J. 59, 68 (2004). Even Congress has acknowledged that the United States is a net exporter of certain types of transboundary pollutants. *See, e.g.*, Sen. Bill No. 906 (110th Cong.) (introduced Mar. 15, 2007) (proposing mercury regulation based on findings that mercury is a transboundary pollutant and the United States is a net exporter of mercury worldwide).

United States industry—including members of *amici*—will, of course, bear the brunt of private enforcement actions brought by citizens of a foreign nation against companies operating in the United States for perceived violations of foreign environmental laws. The potential for U.S. businesses to face private environmental enforcement efforts will extend far beyond Canada, because science is increasingly capable of documenting the long-range transport of pollutants.[10] The Ninth Circuit's decision permits the

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[10] *See, e.g.*, Rokjin J. Park, *et al.*, "Natural and Transboundary Pollution Influences on Sulfate-Nitrate-Ammonium Aerosols in the United States," 109 Journal of Geophysical Research D15204 (2004) (tracking transboundary pollutants from Canada, Mexico, and Asia to the United States and contribution of transboundary pollutants from United States to Europe and North Africa); Leta Hong Fincher, Voice of America News: Worldwatch Institute—16 of the World's Most-Polluted Cities in China (June 28, 2006)

source of pollution to be held liable wherever it ultimately lands, so long as science can document the long-range transport of the pollution.

And this is so even if the company's conduct was fully in accord with the governing law of the sovereign nation in which it operates. *Amici*'s members regularly operate under permits from the EPA. At present, they can be confident that if their operations conform to their government-approved permits, they will not be violating federal environmental laws. *See, e.g.*, 33 U.S.C. § 1342(k) (compliance with a permit issued under the Clean Water Act is deemed compliance with that Act); 42 U.S.C. § 7661c(f) (compliance with a permit issued under the Clean Air Act is deemed compliance with that Act); *see also, e.g.*, 30 C.F.R. § 780.15 (outlining air pollution control plan required to obtain surface mining permit); 30 C.F.R. § 780.18 (outlining reclamation plan required for surface mining permit, including steps to be taken to comply with the Clean Air Act, Clean Water Act, and other environmental laws and regulations).

The Ninth Circuit's ruling, if it stands, will embolden foreign plaintiffs to sue U.S. businesses for purported environmental wrongs—as dictated by the standards of their own environmental law regimes, not United States law. As a result, companies in the United States, which currently expend vast resources ensuring that their businesses operate in accordance with our Nation's law, would have to devote even more substantial efforts, money, and personnel to examining environmental law around the world, and to attempting to protect or insure against potential liability under all of those laws as well. And the price of noncompliance with one or more foreign sovereign's laws

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(discussing atmospheric transport of pollution to the United States from China); Clean Air Report, *Industry Calls for Relaxed Haze Rule Following New Emissions Study* (Mar. 9, 2006) (discussing study finding transboundary pollution from Canada, Mexico, and Asia makes "large contributions" to haze in the United States).

could be steep indeed: the same discharge or emission could result in exponential liability in numerous countries, depending on how far science is able to follow the trail around the globe. This in turn will introduce grave unpredictability about potential environmental liability from foreign environmental laws. And that instability in turn will necessarily hamper trade and economic growth. *See, e.g.*, Christopher L. Ingrim, *Choice-of-Law Clauses: Their Effect on Extraterritorial Analysis—A Scholar's Dream, A Practitioner's Nightmare*, 28 Creighton L. Rev. 663, 664 (1995) (legal uncertainty is "inherently disturbing to the international business community which requires a reasonable amount of certainty and predictability in order to trade freely and efficiently in today's global economy").

To say the least, this is not a happy prospect for United States industry. The Ninth Circuit's ruling is not just an ill-considered and indefensible textual interpretation of CERCLA. It was issued without regard to the diplomatic sensitivities that must inform the menu of available remedies in any instance of transboundary pollution, and without regard to the prospect that many stalwart American industries may now be subjected to exponential foreign liability for their daily domestic operations—all depending on which way the wind blows or the water flows. Certiorari should be granted to address and resolve this issue.

II. THIS COURT'S REVIEW IS NEEDED TO ESTABLISH NATIONAL UNIFORMITY ON THE QUESTION OF ARRANGER LIABILITY.

The circuit split on the scope of arranger liability under § 107(a)(3) is ripe and merits review. *See* S. Ct. Rule. 10(a); *see also South Florida Water Mgmt. Dist.* v. *Montalvo*, 84 F.3d 402, 406 (11th Cir. 1996) (noting that courts have "struggled with the contours of 'arranger' liability under § 107(a)(3)"). The First and Ninth Circuits have taken diametrically opposed positions on what the term "by any other party or entity" modifies—which in turn determines

who is within the third category of "covered persons" under CERCLA's liability provision.[11]

When presented with the question who is included in the scope of arranger liability, the First Circuit turned to the "sentence structure" of § 107(a)(3)—which it found "makes it clear" that the provision attaches when the party who owns or possesses the hazardous material arranges *with another party* for disposal or treatment of that material. *American Cyanamid Co.* v. *Capuano*, 381 F.3d 6, 24 (1st Cir. 2004). In reaching its conclusion, the First Circuit expressly rejected an interpretation of the statute that would have required editing the operative provision of the statute to add a new word—"or"—not in the text. The First Circuit thus declined to read CERCLA so as to "make liable any person who arranged for the disposal of a hazardous substance 'owned or possessed by such person [*or*] by any other party or entity.' " *Id.* at 23-24 (emphasis added).

The Ninth Circuit had no such compunction about retrofitting the statute to suit its preferred interpretation. Within the Ninth Circuit, arranger liability extends to "any person who * * * arranged for disposal or treatment * * * of hazardous substances owned or possessed by such person [*or*] by any other party or entity." Pet. App. 24a (emphasis added). The Ninth Circuit thus has eliminated any requirement that a party "arrange" with a third party for disposal before arranger liability attaches, while the First Circuit has upheld the requirement of third-party

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[11] The arranger liability provision states in relevant part that: "any person who by contract, agreement, or otherwise arranged for disposal or treatment * * * of hazardous substances owned or possessed by such person, *by any other party or entity*, at any facility * * * from which there is a release * * * of a hazardous substance, shall be liable" for certain costs. 42 U.S.C. § 9607(a)(3), (4) (emphasis added to disputed clause).

participation.[12] *Amici*'s members, who have operations in both the First and Ninth Circuits, now face national business uncertainty about the scope of arranger liability.

The starting point for interpreting a statute is always the plain and unambiguous meaning of the statute. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997). That a statute "is awkward, and even ungrammatical" does not mean it is ambiguous on the point at issue. *Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004). The Ninth Circuit, in the guise of employing a "liberal judicial interpretation" of CERCLA (Pet. App. 26a), added the word "or" to the liability provision. Its stated reason: adhering to the plain language of the statute would create a gap in the liability regime. *Id.* Perhaps, or perhaps not. But it is not the province of a Ninth Circuit panel to remedy a perceived legislative oversight.

The Ninth Circuit's reading "is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." *Iselin* v. *United States*, 270 U.S. 245, 251 (1926). But as this Court made clear long ago, "[t]o supply omissions transcends the judicial function." *Id.* Courts may not "read an absent word into the statute" when

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[12] Further support for the First Circuit's holding—and further confirmation that the Ninth Circuit erred—can be found in the established interpretive cannons of *noscitur a sociis* and *ejusdem generis*. Under these canons, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Washington State Dep't of Social & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (quotation omitted). Applied here, the term "otherwise arranged"—as the last item in the sequence "by contract, agreement or otherwise arranged"—should have the same requirement of two-party conduct shared by the preceding terms, "contract" and "agreement." That is the First Circuit's interpretation, and it is the far better reasoned one.

there is a "plain, nonabsurd meaning in view." *Lamie*, 540 U.S. at 538; *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978) (courts "have no authority to substitute [their] views for those expressed by Congress in a duly enacted statute"). By adding the word "or" the Ninth Circuit radically expanded the scope of arranger liability. Its decision merits review. The arranger-liability requirements should be the same in all federal courts and should be based on clear, predictable rules. The conflict created by the decision below will directly affect companies and industries that operate in multiple states, including *amici*'s members who now face varying rules and potentially different outcomes with respect to a crucial liability determination. The Court should grant certiorari and establish national uniformity on this important question presented.

CONCLUSION

For the foregoing reasons, as well as those presented in the petition, the petition should be granted.

Respectfully submitted,

Of Counsel:

HAROLD P. QUINN, JR.
TAWNY A. BRIDGEFORD
NATIONAL MINING ASSOCIATION
101 Constitution Avenue, N.W.
Suite 500 East
Washington, D.C. 20001
(202) 463-2600

JAN S. AMUNDSON
QUENTIN RIEGEL
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 637-3000

CATHERINE E. STETSON
Counsel of Record
JESSICA L. ELLSWORTH
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

Counsel for Amici Curiae